State, and local laws and regulations. The City has unusual, extraterritorial authority to review and approve certain activities in and adjacent to certain wetlands within the watershed of its drinking water supply. N.Y. Pub. Health Law § 1100(1) (McKinney 2005); N.Y. Comp. Codes R. & Regs. tit. 10, Part 128 (2005). The City's regulatory authority, however, like New York State's, is generally limited to wetlands exceeding 12.4 acres. N.Y. Comp. Codes R. & Regs. tit. 10, § 128-1.6(a)(116) (2005); N.Y. Comp. Codes R. & Regs. tit. 6, § 663.2(p) (2005). Based on the City's inventory of wetlands in the watershed of its water supply, nearly 10,000 acres, or 40 percent of these wetlands are not subject to regulation by New York State or the City because they do not meet the size threshold. Moreover, of these smaller wetlands, which nonetheless provide significant water quality benefits, approximately 4,300 acres, or 43 percent, lack regular, obvious surface connections to surface waters.

In contrast, the federal Clean Water Act regulates wetlands based on hydrology, soils, and vegetation rather than on size. *See, e.g.*, 33 C.F.R. § 328.3(b) (2006). The City thus relies on federal protection of smaller wetlands within its watershed. Indeed, recognizing the essential importance of small wetlands in the portion of the City's water supply system most affected by development, the ACOE has designated the City's Croton watershed as a Critical Resource Water. As a consequence, many of the "Nationwide Permits" that generally authorize projects disturbing less than half an acre of wetlands, subject to certain categorical conditions, do not apply in the Croton watershed, and thus any activity that will disturb a wetland – regardless of the size of the wetland or extent of disturbance – requires an individual permit. *See* Issuance of Nationwide Permits; Notice, Part II, 67 Fed. Reg. 2020, 2093 (Jan. 15, 2002).

The functioning of wetlands including wetlands that lack discernable surface connections to streams – in a typical sub-watershed within the City's water supply system is described below. Because of the critical importance of such wetlands, the City respectfully urges this Court to affirm that the Clean Water Act establishes jurisdiction over all wetlands with a significant nexus to the quality and quantity of the Nation's navigable waters.

SUMMARY OF ARGUMENT

Since 1972, the Federal Water Pollution Control Act, or "Clean Water Act," has provided a comprehensive framework for federal efforts to protect waters of the United States. 33 U.S.C. § 1251 *et seq.* Its objective is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." *Id.* § 1251(a). Pursuant to Section 404(a) of the Act, any person must obtain a permit from the Army Corps of Engineers before discharging "dredged or fill material" into navigable waters. 33 U.S.C. § 1344(a). The Army Corps' regulations implementing Section 404(a) specify that permits are required for all fill activities that affect navigable waters, either directly or indirectly via tributary water bodies or wetlands. 33 C.F.R. §§ 320-29.

In *United States v. Riverside Bayview Homes*, this Court upheld the Army Corps' jurisdiction over wetlands adjacent to navigable waters, deferring to "the Corps' ecological judgment about the relationship between waters and their adjacent wetlands." 474 U.S. 121, 134 (1985) ("*Riverside Bayview*"). In *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, this Court clarified the scope of federal Clean Water Act jurisdiction by requiring a "significant nexus" between the regulated wetland and traditionally navigable waters. 531

U.S. 159, 167 (2001) ("*SWANCC*"). Several appellate courts, including the United States Court of Appeals for the Sixth Circuit in the instant cases, have used this type of analysis to sustain federal jurisdiction over wetlands that affect the quantity and quality of surrounding navigable waters, even when their hydrological connections to the navigable waters are intermittent or circuitous. *See, e.g., United States v. Rapanos*, 376 F.3d 629 (6th Cir. 2004); *Carabell v. United States Army Corps of Engineers*, 391 F.3d 704 (6th Cir. 2004); *United States v. Gerke Excavating*, 412 F.3d 804 (7th Cir. 2005); *Treacy v. Newdunn Associates*, 344 F.3d 407, 417 (4th Cir. 2003). Federal authority to restrict filling of such wetlands stems from the power to regulate activities which, particularly in the aggregate, "substantially impact interstate commerce," as discussed in *United States v. Lopez* 514 U.S. 549, 557 (1995). *See also Gonzalez v. Raich*, 125 S.Ct. 2195, 2205-08 (2005).

The City of New York, as the manager of a large and complex drinking water system and a regulator of certain land use activities in its watershed, shares the Army Corps' considered view that protecting hydrologically and ecologically connected wetlands is essential to protecting the quality and quantity of navigable waters. In fact, it would not be possible to achieve the stated purpose of the Clean Water Act if federal agencies lacked authority to regulate wetlands that satisfy the "significant nexus" test.

WETLAND FUNCTIONS WITHIN A WATERSHED

To illustrate the nexus of wetland protection to the protection of navigable waters, and particularly to emphasize the importance of small and remotely connected wetlands in protecting water quality, the City describes the water quality benefits provided by various wetlands within

the watershed of the City's West Branch reservoir. The West Branch reservoir is located within the City's Croton water supply system which, as noted above, is the most affected by development of the City's three interconnected water supply systems. It is a critical reservoir to the City, as it generally receives water from the City's Delaware Aqueduct, which carries approximately 50% of the City's entire water supply from four reservoirs to the west of the Hudson River, as well as from its own watershed.

Streams in the lowest portions of the watershed of the West Branch reservoir have the largest drainage areas, highest flows, and are typically navigable by canoe or kayak. Wetlands along these mainstem waters comprise roughly 40% of the wetland area in the West Branch reservoir watershed. When the flows in these streams exceed channel capacity – when the streams reach flood stage – adjacent wetlands detain and remove sediments, nutrients, and other pollutants from the floodwaters, minimizing flood damage and maintaining water quality. Data collected by the City from wetlands along Gipsy Trail Creek, a large stream in the West Branch reservoir watershed, show a net retention of flow, dissolved phosphorus, and suspended solids during the highest stream flows. In addition to the obvious benefit of such reduced flooding to riparian lands, the lower stream velocities produced by these wetlands mitigate against the erosion and suspension of sediments associated with high and rapid waters.

A system of "headwater" wetlands occurs in the upper reaches of the West Branch basin stream network, often at the sources of streams. These headwater wetlands comprise over 50% of the wetlands in the West Branch reservoir watershed, and all have intermittent or ephemeral surface connections to the mainstem channels that are

tributary to the West Branch reservoir. These headwater wetlands perform a multitude of functions and are among the most important for the quality of surface waters, despite their typical lack of perennial connections.

Headwater wetlands have the greatest opportunity of all wetland types to ameliorate non-point source pollution as they remove nutrients, sediment, and other pollutants from surface runoff *before* it is transported through the upstream tributaries into the mainstems of the watershed.[10] Of the wetlands predicted by the United States Fish and Wildlife Service ("USFWS"), in its functional assessment of wetlands in the City's Croton watershed, to be significant for nutrient transformation and sediment retention in the West Branch reservoir basin, 49% and 67%, respectively, are along headwater tributaries.[11] Headwater wetlands slow the velocity of surface runoff, which stabilizes stream banks and prevents erosion and associated water quality degradation. Forty percent of the wetlands predicted by the USFWS to be significant for shoreline stabilization in the West Branch watershed are in headwater positions.

---

[10] NATIONAL RESEARCH COUNCIL, COMPENSATING FOR WETLAND LOSSES UNDER THE CLEAN WATER ACT (2001) available at http://books.nap.edu/catalog/10134.html.

[11] R.W. TINER, C.W. POLZEN, AND B.J. MCCLAIN, UNITED STATES FISH AND WILDLIFE SERVICE, WETLAND CHARACTERIZATION AND PRELIMINARY ASSESSMENT OF WETLAND FUNCTIONS FOR THE CROTON WATERSHED OF THE NEW YORK CITY WATER SUPPLY SYSTEM (2004), prepared for and available from the New York City Department of Environmental Protection, Valhalla, NY. Subsequent references in this section to USFWS predictions also refer to this report.

In addition to these water quality benefits, headwater wetlands detain surface water from their catchment areas, which reduces and delays peak stream flows, thus reducing the frequency and severity of floods. In its watershed-scale functional assessment, USFWS estimated that approximately half of the wetlands that are significant for surface water detention in the West Branch reservoir watershed are located in headwater positions. Another study of the Croton Watershed found decreased peak flow and increased lag time between the period of maximum rainfall and maximum runoff in a sub-basin that contained a headwater wetland when compared to a similar sub-basin without such wetlands.[12]

Headwater wetlands are also important for maintaining stream flow, as detained stormwater is released slowly to stream channels during times of low flow. Ninety percent of wetlands predicted by the USFWS to be highly significant for streamflow maintenance in the West Branch Reservoir Watershed are along headwater tributaries. In addition, many of these headwater wetlands replenish groundwater, which forms the base flow for tributaries during dry periods.

Finally, a number of wetlands lack regular surface connections to tributary systems. These geographically isolated wetlands comprise approximately 4% of the wetland area in the West Branch reservoir watershed. Despite their lack of discernable surface water connections, these wetlands, like those in headwater wetland positions, are important for detaining surface waters and ameliorating

---

[12] JAMES HASSETT, STATE UNIVERSITY OF NEW YORK COLLEGE OF ENVIRONMENTAL SCIENCE AND FORESTRY, THE CROTON PROCESS STUDIES PROJECT (2003).

non-point source pollution from their local catchment areas. Because they lack outflows, these wetlands serve as permanent "sinks" for precipitation, overland flow and any associated nutrients and pollutants that would otherwise flow to downgradient waters in surface runoff. These "isolated" wetlands also restore groundwater resources and thus contribute to the base flows of downgradient surface waters.

The wetlands in the West Branch reservoir watershed thus all have a significant nexus to water quality and quantity in the West Branch reservoir, among other navigable water bodies.

ARGUMENT

I

THE CLEAN WATER ACT PROVIDES FEDERAL JURISDICTION OVER ANY WETLAND WITH A "SIGNIFICANT NEXUS" TO NAVIGABLE WATERS.

It is well established that protection of wetlands was integral to Congress' efforts to preserve water quality on a broad scale under the Clean Water Act. *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985). In *Riverside Bayview*, respondents challenged the Army Corps' jurisdiction over Michigan wetlands they sought to fill in preparation for construction of housing, arguing that jurisdiction under the Clean Water Act did not extend to an area of "low-lying, marshy land" adjacent to a navigable lake. *Id.* at 124. The Court rejected that argument, concluding that "the language, policies, and history of the Clean Water Act" supported the Army Corps' determination that wetlands adjacent to navigable waters were subject to Clean Water Act regulation. *Id.* at 139. In

unanimously upholding federal jurisdiction over these wetlands, the Court observed:

> In view of the breadth of federal regulatory authority contemplated by the Act itself and the inherent difficulties of defining precise bounds to regulable waters, the Corps' ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act.

474 U.S. at 134. The Court did not define or limit the application of the term "adjacent" in *Riverside Bayview*. Rather, the decision emphasized the ecological necessity of protecting nearby wetlands in order to protect the navigable waters with which they were connected. *Id.*

Significantly, the Court based its *Riverside Bayview* holding largely on deference to the Army Corps' scientific conclusions about the role of adjacent wetlands in preserving the quality of navigable waters. The Army Corps had determined that adjacent wetlands "may affect the water quality of adjacent lakes, rivers, and streams" because the wetlands may "drain into" the larger water bodies, and that they "may serve to filter and purify water draining into adjacent bodies of water ... and to ... prevent flooding and erosion...." *Id.* at 134. The Court concluded that these determinations, rooted in "the Corps' and EPA's technical expertise," were reasonable. *Id. See also United States v. Deaton*, 332 F.3d 698, 712 (4th Cir. 2001) ("breadth of congressional concern for protection of water quality and aquatic ecosystems" justifies federal Clean Water Act jurisdiction over headwater wetlands whose waters sometimes flow through drainage ditches into the

natural tributary system of a navigable river), *cert. denied*, 541 U.S. 972 (2004); *United States v. Pozsgai*, 999 F.2d 719, 727-34 (3rd Cir. 1999) (citing broad jurisdictional scope envisioned in legislative history of Clean Water Act in upholding federal regulation of wetland adjacent to navigable waters).

This Court next addressed the issue of Clean Water Act jurisdiction over wetlands in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2000). Under *SWANCC*, which affirmed *Riverside Bayview*, federal regulators must demonstrate a "significant nexus" between the wetland in question and traditionally navigable waters in order to establish jurisdiction under Section 404(b) of the Clean Water Act.[13] *Id.* at 167.

---

[13] This test has also been used to justify Clean Water Act jurisdiction over water bodies other than wetlands that are not navigable in fact, but which affect navigable waters. In *Headwaters v. Talent Irrigation District*, 243 F.3d 526 (9th Cir. 2001), for example, the Ninth Circuit held that certain irrigation canals were subject to federal Clean Water Act jurisdiction. *Id.* at 528-29. Although a system of mechanical gates separated the artificial canals from nearby natural streams under normal circumstances, the court found that occasional water leaks from the canals into the streams were sufficient to render them "connected" and to establish Army Corps jurisdiction over the canals. *Id.* at 533-34. *Cf. United States v. Eidson*, 108 F.3d 1336, 1342 (11th Cir. 1997) (upholding Clean Water Act jurisdiction over artificial drainage ditches, which intermittently fed into larger conduits which in turn emptied into Tampa Bay, noting that polluted water need not flow "immediately or continuously" from a non-navigable tributary into navigable waters "in order to inflict serious environmental damages").

In *SWANCC*, the Court ruled that a significant nexus to navigable waters did not exist where the only asserted basis for Army Corps jurisdiction over the wetlands in question was their serving as habitat for migratory birds. *Id.* Because the Army Corps' claim to jurisdiction was based exclusively on the "Migratory Bird Rule," the *SWANCC* Court focused on the inadequacy of that rule rather than on the question of the requisite hydrological connection between wetlands and navigable waters.

Thus, the specific holding in *SWANCC* has little bearing on the cases now before this Court, where hydrological connections between the wetlands at issue and navigable waterways have been demonstrated. In establishing the "significant nexus" test, however, the Court signaled that the determination of Clean Water Act jurisdiction over wetlands is appropriately made by agencies with technical expertise to evaluate the nature of the hydrological connections between wetlands and navigable waters.

In applying this Court's decisions in *Riverside Bayview* and *SWANCC*, courts have generally deferred to expert agencies when they have found a "significant nexus" between wetlands and navigable waters, even where the hydrological connections have been seemingly remote. In *Treacy v. Newdunn Associates*, for example, the Fourth Circuit upheld federal jurisdiction over wetlands connected to a traditionally navigable river through natural and artificial waterways, even though water flowed from the wetlands only "intermittently" and traveled along a convoluted 2.4 mile path, including a ditch running under an interstate highway, before reaching the river. 344 F.3d 407, 417 (4th Cir. 2003), *cert. denied, Newdunn Assocs. v. United States Army Corps of Engineers*, 541 U.S. 972

(2004). In *United States v. Deaton*, *supra*, the Fourth Circuit also found Clean Water Act jurisdiction over a wetland area whose path of hydrological connection to a navigable river stretched more than eight miles and consisted in part of a human-made roadside ditch.

Similarly, in *Northern California River Watch v. City of Healdsburg*, a district court found a significant nexus between an artificial gravel pit and the nearby Russian River, where "the wetlands in question help[ed] filter pollutants entering the aquifer and hence the river proper." No. C01-04686, 2004 U.S. Dist. LEXIS 1008, *29 (N.D. Cal. Jan. 23, 2004), No. 04-15442 (9th Cir. argued Nov. 16, 2005). Based on this finding of a direct water quality benefit provided by the wetland, the court held that federal jurisdiction was appropriate even though the water was exchanged through an underground aquifer rather than a surface connection. In *United States v. Lamplight Equestrian Center*, the Northern District of Illinois found Clean Water Act jurisdiction appropriate where seasonally saturated ground adjacent to a drainage ditch created an intermittent hydrological connection to a navigable river, observing that "[w]ater need not flow in an unbroken line at all times to constitute a sufficient connection to navigable water or its tributaries" for federal Clean Water Act jurisdiction. No. 00 C 6486, 2002 U.S. Dist. LEXIS 3694 at *20-*23 (N.D. Ill. Mar. 8, 2002).

In the cases now before the Court, the government has reasonably determined that the wetlands at issue are hydrologically connected to navigable waters and have a significant nexus to water quality and quantity in those waters. *Rapanos*, 376 F.3d at 634, 639-40; *Carabell*, 391 F.3d at 708-10. The Rapanos petitioners, whose wetlands bear an important hydrological connection to navigable waters, *Rapanos* at 642-43, challenge federal jurisdiction

because of the artificial nature of portions of the connection and the length and circuity of the route water travels between the wetlands and navigable waters. Where the agency with authority and expertise has found a significant nexus, however, these arguments must fail. *Deaton*, 332 F.3d 698; *Northern California River Watch v. City of Healdsburg*, 2004 U.S. Dist. LEXIS 1008.

Similarly, in *Carabell*, the court focused on the Army Corps' finding that the wetlands at issue provided "water storage functions that, if destroyed, could result in an increased risk of erosion and degradation of water quality in" downgradient navigable waters. 391 F.3d at 706. As in *Treacy*, 344 F.3d 407, and *Lamplight Equestrian Center*, 2002 U.S. Dist. LEXIS 3694, the intermittent nature of a connection does not destroy its ecological significance during the seasons when flooding or seepage occur.[14]

Petitioners ask this Court to evaluate the hydrological connections between the particular wetlands at issue in the instant cases and navigable waters, and to make a determination that these connections are insufficient to give rise to Clean Water Act jurisdiction. As this Court has appropriately recognized, however, such determinations must be made by experts, based on site-specific information about the effects wetlands have on their receiving waters. *See Riverside Bayview*, 474 U.S. at 133-134; *SWANCC* 531 U.S. at 167.

Wetlands within a watershed may contribute significant base flow to, attenuate erosive flows in, and

---

[14] Indeed, as noted above, wetlands perform many important functions during flooding.

remove excessive nutrients, sediments, and other contaminants from downgradient navigable waters. Such wetlands thus have a significant nexus to navigable waters, and should therefore be regulated under the Clean Water Act.

II

PRESERVATION OF WATER QUALITY BY REGULATING WETLANDS WITH A SIGNIFICANT NEXUS TO NAVIGABLE WATERS IS AN APPROPRIATE FEDERAL FUNCTION UNDER THE COMMERCE CLAUSE.

Contrary to the petitioners' protestations, federal jurisdiction over wetlands sharing a "significant nexus" with navigable waters of the United States is entirely appropriate under the Commerce Clause of the United States Constitution. Congress may properly assert jurisdiction pursuant to the Commerce Clause when it has a rational basis for believing that the regulated activity affects interstate commerce "sufficiently" to justify federal regulation. *United States v. Lopez*, 514 U.S. 549, 557 (1995).

The Court has recognized three permissible categories of regulation under the Commerce Clause: regulation of channels of interstate commerce; protection of instrumentalities of interstate commerce, including persons or things traveling interstate; and regulation of activities "having a substantial relation to" or "substantially affecting" interstate commerce. *Id.* at 558-59. While federal Clean Water Act jurisdiction includes direct regulation of waters that are navigable in fact and thus constitute "channels of commerce," Congress appropriately

assumed jurisdiction over a much broader range of waters, tributary to or otherwise influencing navigable waters, because they "substantially affect" interstate commerce.[15]

In order "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. §1251(a), regulation of more than waters that are navigable in fact is thus required. To achieve the stated purpose of the Clean Water Act, agencies need the flexibility to regulate tributaries to the Nation's waters, wetlands with consistent or intermittent surface connections to such waters and, in some instances, wetlands which are hydrologically "isolated," but which nevertheless have a significant nexus to the commercial and ecological value of navigable waters.

In *United States v. Gerke Excavating*, 412 F.3d 804 (7th Cir. 2005), the Seventh Circuit rejected the argument that federal jurisdiction over privately owned wetlands exceeded the scope of federal Commerce Clause authority. Like the wetlands at issue in *Rapanos* and *Carabell*, and like many in the watershed of New York City's drinking water supply, the wetland at issue in *Gerke* was connected

---

[15] In *SWANCC*, this Court considered whether Congress relied solely upon the "channels of commerce" basis of jurisdiction for the Clean Water Act but declined to reach a holding. 531 U.S. at 169 n.3, 172. Indeed, recognizing that the Clean Water Act covers activities well beyond the use of channels of commerce, the Court noted that to determine the extent of Clean Water Act regulation permissible under the Commerce Clause, it "would have to evaluate the precise object or activity that, *in the aggregate, substantially affects interstate commerce*." *Id.* at 173 (emphasis added). *See also Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1071 (D.C. Cir. 2003).

only indirectly via a ditch, a creek, and then a nonnavigable "river" to a river that was navigable in fact. *Id.* at 805. The court held first that by restricting the filling of wetlands that "supply some of the water in navigable waterways," federal regulators were protecting channels of interstate commerce. The Seventh Circuit went on to note that federal jurisdiction is appropriate "even if the pollution has no [physical] effect on navigability" and the impact on navigable waters' quality is the sole basis for asserting federal jurisdiction. *Id.* at 807.

Although filling a single wetland might seem attenuated from interstate commerce, through aggregation such fill activities can "substantially affect interstate commerce" and thus trigger federal jurisdiction under the Commerce Clause. *See Gerke*, 412 F.3d at 806-07; *see also Citizens Bank v. Alafabco*, 539 U.S. 52, 56-57 (2003) (Commerce Clause power 'may be exercised in individual cases without showing any specific effect upon interstate commerce' if in the aggregate the economic activity in question would represent 'a general practice . . . subject to federal control.'"); *Gonzales v. Raich*, __ U.S. __, 125 S.Ct. 2195, 2205-08 (2005).

As noted above, *SWANCC* and its subsequent interpretations have established that a "significant nexus" between a wetland and navigable waters is sufficient to justify federal regulation of the wetland. Where there is a significant nexus between wetlands and navigable waters, impairment of the wetlands significantly threatens water quality in the navigable body. This represents a "substantial relation" between the regulated activity (filling or other impairment of hydrologically connected wetlands) and interstate commerce (as practiced via navigable waters), and thus fulfills the test for Commerce Clause jurisdiction. *United States v. Lopez*, 514 U.S. 549; *United*

States v. Gerke Excavating, 412 F.3d at 806. *See also United States v. Cortes*, 299 F.3d 1030, 1036 (9th Cir. 2002); *United States v. Kung-Shou Ho*, 311 F.3d 589, 600-04 (5th Cir. 2002).

The functions of wetlands in the New York City watershed illustrate the substantial relationship between federal regulation of wetlands and interstate commerce. Ensuring that plans to dredge or fill wetlands are subject to appropriate reviews and approvals supports the maintenance of a clean drinking water supply – a service the absence of which would substantially affect interstate commerce. Protecting wetlands from fill and other impairments also helps wetlands store and discharge water when appropriate, thus ensuring a steady quantity and velocity of water flow in navigable bodies (in contrast to flood or drought conditions which can impair drinking water supplies). *See, e.g., Gerke*, 412 F.3d at 806.

CONCLUSION

For all the foregoing reasons, *amicus* the City of New York respectfully urges this Court to affirm the decisions of the Court of Appeals for the Sixth Circuit in order to avoid serious negative consequences for the many public agencies and authorities nationwide involved in maintaining clean and safe water supplies.

Respectfully submitted,

MICHAEL A. CARDOZO
Corporation Counsel of the
City of New York
Attorney for *Amicus Curiae*
The City of New York
100 Church Street
New York, New York 10007
(212) 788-1585

LEONARD J. KOERNER,*
HILARY MELTZER,
AMANDA GOAD,**
of Counsel.

*Counsel of Record
**Awaiting Admission to the Bar of the State of New York

(31) (27)

Nos. 04-1034, 04-1384

IN THE

Supreme Court of the United States

JOHN A. RAPANOS, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

JUNE CARABELL, *et al.*,

Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE STATES OF NEW YORK, MICHIGAN, ARIZONA, ARKANSAS, CALIFORNIA, CONNECTICUT, DELAWARE, FLORIDA, HAWAII, ILLINOIS, IOWA, KENTUCKY, LOUISIANA, MAINE, MARYLAND, MASSACHUSETTS, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, OHIO, OKLAHOMA, OREGON, RHODE ISLAND, SOUTH CAROLINA, TENNESSEE, VERMONT, WASHINGTON, AND WISCONSIN, THE DISTRICT OF COLUMBIA, THE PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION, AND THE INTERNATIONAL ASSOCIATION OF FISH AND WILDLIFE AGENCIES AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

MICHAEL A. COX
Attorney General of the State of Michigan
THOMAS L. CASEY
Solicitor General
P.O. Box 30212
Lansing, MI 48909
(517) 373-1124

ELIOT SPITZER
Attorney General of the State of New York
CAITLIN J. HALLIGAN*
Solicitor General
120 Broadway
New York, NY 10271
(212) 416-8016

* *Counsel of Record*

Attorneys for Amici Curiae
(Additional Attorneys Listed on Signature Page)

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. WETLANDS ADJACENT TO TRIBUTARIES OF NAVIGABLE WATERS ARE "WATERS OF THE UNITED STATES" UNDER THE ACT 5

A. The Experience of the States in Implementing the Act Confirms the Importance of Headwaters to Downstream "Navigable" Waters. 5

B. Requiring a Case-by-Case Determination of a Significant Effect for Each Wetland Would Undermine State and Federal Efforts to Control Water Pollution. 11

II. COVERAGE OF WETLANDS ADJACENT TO TRIBUTARIES IS NECESSARY TO MAINTAIN THE RESPECTIVE ROLES ASSIGNED BY THE ACT TO THE FEDERAL AND STATE GOVERNMENTS .. 14

Contents

Page

III. FEDERAL POWER OVER INTERSTATE COMMERCE INCLUDES THE POWER TO REGULATE DISCHARGES INTO WETLANDS ADJACENT TO NON-NAVIGABLE TRIBUTARIES 18

CONCLUSION 23

TABLE OF AUTHORITIES

CASES

Page

Arkansas v. Oklahoma,
503 U.S. 91 (1992) 14

Baccarat Fremont Developers, LLC v. U.S. Army Corp of Eng'rs,
425 F.3d 1150 (9th Cir. 2005) 21

Chem. Waste Mgmt., Inc. v. Hunt,
504 U.S. 334 (1992) 21

City of Milwaukee v. Illinois,
451 U.S. 304 (1981) 10, 14

Cont'l T.V., Inc. v. GTE Sylvania Inc.,
433 U.S. 36 (1977) 14

EPA v. California,
426 U.S. 200 (1976) 12

Friends of the Earth v. Hintz,
800 F.2d 822, 824 (9th Cir. 1986) 21

Gonzalez v. Raich,
125 S. Ct. 2195 (2005) 19, 20, 21

Harris v. United States,
536 U.S. 545 (2002) 19

Hill v. Boy,
144 F.3d 1446 (11th Cir. 1998) 21

Cited Authorities

Page

Hoffman Homes, Inc. v. U.S. EPA,
999 F.2d 256 (7th Cir. 1993) 21

Int'l Paper Co. v. Ouellette,
479 U.S. 481 (1987) 10, 14, 15

Mich. Peat v. U.S. EPA,
175 F.3d 422 (6th Cir. 1999) 21

Monongahela Power Co. v. Marsh,
809 F.2d 41 (D.C. Cir. 1987) 21

Moskal v. United States,
498 U.S. 103 (1990) 17

Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.,
313 U.S. 508 (1941) 20

Save Our Sonoran, Inc. v. Flowers,
408 F.3d 1113 (9th Cir. 2005) 21

Solid Waste Agency v. U.S. Army Corps of Engineers,
531 U.S. 159 (2001) 13, 21

Stone v. INS,
514 U.S. 386 (1995) 17

The Daniel Ball,
77 U.S. 557 (1871) 19

United States v. Brace,
41 F.3d 117 (3d Cir. 1994) 21

Cited Authorities

Page

United States v. Deaton,
209 F.3d 331 (4th Cir. 2000) 21

United States v. Grand River Dam Auth.,
363 U.S. 229 (1960) 19

United States v. Lopez,
514 U.S. 549 (1995) 19, 22

United States v. Morrison,
529 U.S. 598 (2000) 22

United States v. Pozsgai,
999 F.2d 719 (3d Cir. 1993) 21

United States v. Rio Grande Dam & Irrigation Co.,
174 U.S. 690 (1899) 19-20

United States v. Riverside Bayview Homes, Inc.,
474 U.S. 121 (1985) 6, 13, 17, 21

United States v. Wilson,
133 F.3d 251 (4th Cir. 1997) 21

Weyerhaeuser Co. v. Costle,
590 F.2d 1011 (D.C. Cir. 1978) 12

CONSTITUTION

U.S. Const. art. I, § 8 18

Cited Authorities

Page

STATUTES

Rivers and Harbors Act of 1899, ch. 425, 30 Stat. 1121 (codified at 33 U.S.C. § 407) 8-9, 16

33 U.S.C. § 1251 15

33 U.S.C. § 1311 5

33 U.S.C. § 1344 ..... 13, 16, 17

33 U.S.C. § 1362 5

REGULATIONS

33 C.F.R. § 328.3 ..... 5, 10

40 C.F.R. § 230.3 ..... 5, 10

40 C.F.R. § 233.70 3

40 C.F.R. § 233.71 3

40 Fed. Reg. 31,320 (July 25, 1975) 5

65 Fed. Reg. 12,818 (Mar. 9, 2000) 5

Cited Authorities

Page

CONGRESSIONAL DOCUMENTS

S. Rep. No. 92-414 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668 ..... 9, 11

MISCELLANEOUS AUTHORITY

Bruce J. Peterson et al., "Control of Nitrogen Export from Watersheds by Headwater Streams," 292 Sci. 86 (2001) 6

Carol A. Johnston, "Sediment and Nutrient Retention by Freshwater Wetlands: Effects on Surface Water Quality," 21 Critical Revs. Envtl. Control 491 (1991) 6

Charles A. Rhodes, Jr., *Findings in the Mid-Atlantic Region Concerning Implications for Clean Water Act Jurisdiction for Various Interpretations of SWANCC*, at 10 (2005), available at http://www.aswm.org/calendar/legal/rhodes.pdf. 9

Cliff R. Hupp & David E. Bazemore, "Spatial and Temporal Aspects of Sediment Deposition in West Tennessee Forested Wetlands," 141 J. Hydrology 179 (1993) 6

Comments of David R. Cox, Technical Guidance Supervisor, North Carolina Wildlife Resources Commission on the ANPRM (Apr. 15, 2003) ... 12

Comments of Jan H. Reitsma, Director, Rhode Island Department of Environmental Management on the ANPRM (Apr. 16, 2003) 7

Cited Authorities

Page

Comments of Jeffrey R. Vonk, Director, Iowa Department of Natural Resources on the ANPRM (Mar. 31, 2003) 12

Comments of Larry D. McKinney, Senior Director, Aquatic Resources, Texas Parks and Wildlife Department on the ANPRM (Apr. 15, 2003) 15

Comments of Lori F. Kaplan, Commissioner, Indiana Department of Environmental Management (April 16, 2003) 15

Comments of the Delaware Department of Natural Resources and Environmental Control (Apr. 16, 2003) 10

Comments of the Tennessee Wildlife Resources Agency on the ANPRM (Feb. 26, 2003) 10

Corps of Engineers, New York District, *Public Notice: Regional Conditions for Nationwide Permits and Designation of Critical Resource Waters*, at 2 (May 21, 2002), available at http://www.nan.usace.army.mil/business/buslinks/regulat/pnotices/nwp_pn.pdf. 9

Judy L. Meyer et al., *Where Rivers Are Born: The Scientific Imperative for Defending Small Streams and Wetlands* 6-7 (2003) 9-10

Lance D. Wood, "Don't Be Misled: CWA Jurisdiction Extends to All Non-Navigable Tributaries of the Traditional Navigable Waters and to Their Adjacent Wetlands," 34 Envtl. L. Rep. 10,187 (2004) 17

Cited Authorities

Page

Lars O. Hedin et al., "Thermodynamic Constraints on Nitrogen Transformations and Other Biogeochemical Processes at Soil-Stream Interfaces," 79 Ecology 684 (1998) 6

Mark M. Brinson et al., U.S. Army Corps of Engineers, *A Guidebook for Application of Hydrogeomorphic Assessments to Riverine Wetlands* (1995) 7

Mark R. Walbridge & Judith P. Struthers, "Phosphorus Retention in Non-Tidal Palustrine Forested Wetlands of the Mid-Atlantic Region," 13 Wetlands 84 (1993) 6

Memorandum from Diana Klemans, Chief, Surface Water Assessment Section, Water Bureau, Mich. Dep't of Envtl. Quality, to S. Peter Manning, Dep't of Attorney General (Jan. 10, 2006) 17

National Research Council, *Wetlands: Characteristics and Boundaries* (1995) 7

N.Y. State Dep't of Envtl. Conservation & Conn. Dep't of Envtl. Prot., *A Total Maximum Daily Load Analysis To Achieve Water Quality Standards for Dissolved Oxygen in Long Island Sound* (Dec. 2000), available at http://www.dec.state.ny.us/website/dow/tmdllis.pdf. 8

Oliver A. Houck, *The Clean Water Act TMDL Program: Law, Policy, and Implementation* (2d ed. 2002) 15

Cited Authorities

Page

Peter M. Groffman et al., "Nitrate Dynamics in Riparian Forests: Microbial Studies," 21 J. Envtl. Quality 666 (1992) 6

Robert M. Holmes et al., "Denitrification in a Nitrogen-Limited Stream Ecosystem," 33 Biogeochemistry 125 (1996) 6

Thomas F. Waters, *Sediment in Streams: Sources, Biological Effects and Control* (1995) 6

U.S. EPA, "Great Lakes Strategy 2002 - A Plan for the New Millennium," http://www.epa.gov.glnpo/gls (last visited Jan. 12, 2006) 8

U.S. Fish & Wildlife Service & U.S. Census Bureau, *2001 National Survey of Fishing, Hunting, and Wildlife - Associated Recreation* (2002) 8

U.S. Nat'l Marine Fisheries Service, *Fisheries of the United States 2004* (2005) 8

Vt. Dep't of Envtl. Conservation & N.Y. State Dep't of Envtl. Conservation, *A Phosphorus Budget, Model, and Load Reduction Strategy for Lake Champlain* (1997), http://www.anr.state.vt.us/dec/waterq/lakes/docs/lp_lcdfs-finalreport.pdf. 7

Mich. Comp. Laws. § 324.30101 11

N.Y. Environmental Conservation Law § 17-0105 ... 11

S.C. Code Ann. § 48-1-10 11

INTEREST OF AMICI CURIAE[1]

For three decades, federal and state agencies, courts, and private parties have understood the federal Clean Water Act to regulate the discharge of pollutants into "traditional" navigable waters, their non-navigable tributaries, and wetlands adjacent to these bodies.[2] These cases present the question of whether the Act covers wetlands adjacent to non-navigable tributaries of traditional navigable waters — in particular, whether section 404 of the Act requires a person to obtain a permit from the U.S. Army Corps of Engineers before discharging dredge or fill material into these wetlands. While amici curiae States, the District of Columbia, the Pennsylvania Department of Environmental Protection, and the International Association of Fish and Wildlife Agencies ("IAFWA")[3] agree that

---

1. Under Rule 37.4 of this Court, amici States and the District of Columbia are not required to obtain consent for the filing of this brief. The parties have consented to the filing of this brief by the Pennsylvania Department of Environmental Protection, a State agency, and the International Association of Fish and Wildlife Agencies. This brief was not written in whole or part by counsel for a party, and no one other than amici made a monetary contribution to its preparation and submission.

2. In this brief, the phrase "traditional navigable waters" refers to waters that are used (or susceptible to use) in interstate or foreign commerce, and the phrase "non-navigable" or "headwater" tributaries refers to tributaries that are not traditional navigable waters. We note, however, that traditional navigable waters include many tributaries that historically were used in commerce by, for example, fur traders or timber companies floating logs to their mills. Additionally, in some States, waters that can be used by recreational vessels like canoes are considered "navigable."

3. The IAFWA is a not-for-profit corporation whose members include the fish and wildlife agencies of all fifty States, the Commonwealth of Puerto Rico, and seven Canadian provinces and territories, as well as federal and dominion agencies having jurisdiction and responsibility for fish and wildlife resources. For over one hundred years, the Association has coordinated efforts of public agencies responsible for protection and management of North American fish and wildlife resources, and it has participated as amicus curiae in more than 20 cases.